NOTES OF CASES.

PLEADING AND PRACTICE—WHEN ADMINISTRATOR MAY SUE IN FORMA PAUPERIS FOR NEGLIGENT KILLING OF HIS INTESTATE—VA. CODE 1904, SECS. 3538-46.—TO permit an administrator to bring an action *in forma pauperis* for the alleged negligent killing of his intestate, it is held, in *Christian* v. *Atlantic & N. C. R. Co.* (N. C.), 68 L. R. A. 418, that he need not show personal inability to give the required bond, or make the necessary deposit, but that it is sufficient if he shows such inability on behalf of the estate and those for whose benefit the suit is really brought. The other cases on the right of executor or administrator to sue, defend, or appeal *in forma pauperis* are considered in a note to this case. The same rule would probably be applied under our statute (Va. Code 1904, Sec. 3538) especially since Sec. 3546 makes the party for whom the suit is brought alone liable for costs.

WILLS—INCORPORATION OF EXTRINSIC DOCUMENT—WM. J. BRYAN'S CELEBRATED CASE.—That the contents of an extrinsic document cannot be incorporated into a will by a clause stating that a sum was given in trust "for the purpose set forth in the sealed letter, which will be found with the will," is declared in Bryan's Appeal (Conn.), 68 L. R. A. 353, where the will contains no clear, explicit, and unambiguous reference to a specific document as the one intended. The other authorities on incorporation of extrinsic document into will are considered in a note to this case.

JURORS—COMPETENCY —Jurors who have rendered a verdict of guilty in a trial of one person for bribery, are held in *People* v. *Mol* (Mich.), 68 L. R. A. 871, not to be impartial within the constitutional requirement, so as to be competent to serve at the trial of another person indicted for the same offense, and whose guilt depends upon practically the same evidence as that offered at the other trial, and the bearing of which upon his guilt must have been considered at that trial. The other cases as to competency of jurors who have served in the same or a similar case are collated in a note to this case.

TRESPASSERS AND LICENSEES ON A RAILROAD RIGHT OF WAY—DUTY OF RAILROAD TOWARDS—It is held in a great many jurisdictions that there is little, if any, difference between the duty of a railroad toward a trespasser and the degree of care owed to a mere licensee on its right of way, and that its sole duty in either case is to refrain from active misconduct or wanton and wilful injury. *Meneo* v. *Cent. R. Co.*, 84 N. Y. Supp. 448; *Wencker* v. *Mo. K. & T. R. Co.*, 169 Mo. 592, 70 S. W. 145; *Ill. Cent. R. Co.* v. *Eicher*, 202 *Ill.*—N. E. 376.

In *Blankenship* v. *C. & O. Ry. Co.*, 94 Va. 449, 455, Judge Buchanan says that there seems to be a recognized distinction between the degree of

care which a railroad owes under ordinary circumstances to a trespasser and that owed to one upon its right of way by license of the company; and while the language of our court in several cases seems to recognize the distinction, the line between them in the adjudicated cases is so fine that it is difficult to discover.

A licensee is a person who is neither a passenger, servant, or trespasser, and who not standing in any contractual relations to the railroad, is permitted by the company to come upon its premises for his own interests or gratification. *Norfolk & W. R. Co.* v. *Wood*, 99 Va. 156, 159; *Northwestern El. R. Co.* v. *O'Malley*, 107 Ill. App. 599. Our court has often held that it is not the duty of the employees of a railroad company, operating its trains, to use reasonable care to discover and avoid injuring persons trespassing upon its tracks. *Seaboard etc. R. Co.* v. *Joyner*, 92 Va. 354; *Tucker* v. *N. & W. Co.*, 92 Va. 549; *Norfolk & W. R. Co.* v. *Dunnaway*, 93 Va. 29, 36; *Chesapeake etc. R. Co.* v. *Rogers*, 100 Va. 324 332. But toward licensees, the rule is laid down that the sole duty that the railroad company owes to such persons is to use reasonable care to discover and not to injure them; but all that this term "discover" seems to include is to keep a lookout ahead, and it does not include having a light on the engine during a dark night; in other words, as far as a trespasser is concerned, the engineer or watchman may go to sleep; but as regards a licensee, the engineer must keep his eyes open and look ahead, even if it is so dark that he cannot see a foot ahead of the engine, and the company is under no obligation, so far as either of the above classes is concerned, to improve his facilities for seeing. *Williamson* v. *Southern Ry. Co.*, 51 S. E. 195, 11 Va. Law Reg. 289; *Blankenship* v. *C. & O. R. Co.* 94 Va. 449, 27 S. E. 20; *C. & O. Ry. Co.* v. *Rogers' Adm'x*, 100 Va. 324, 41 S. E. 732.

It seems pertinent to remark that in the *Rogers case, supra*, the court held that where the community used the railroad right of way daily with the acquiescence of the company. it made no difference whether such persons were trespassers or licensees, for in either case it was the duty of the company to use reasonable care to discover and not to injure such persons; whereas in the *Bruce case, supra*, and in the *Williamson case, supra*, it is specifically decided that such persons are bare licensees.

A slight modification of the above rule in regard to the duty of a railroad to trespassers on its right of way seems to have been adopted in *Myers* v. *Boston & M. R. R.*, 72 N. H. 175, 55 Atl. 72. where it is said: "Notwithstanding the plaintiff was a trespasser upon the defendants' premises at the time he received his injury, it was the duty of the defendants. in the exercise of ordinary care, to avoid injuring him through their active intervention if they knew of his presence in a dangerous situation, or if their failure to know of it was due to their culpable ignorance. In other words, they were in fault if they failed to use due care to discover his presence in a position of danger, when circumstances existed which would put a man of average prudence upon inquiry. *Mitchell* v. *Railroad*,

68 N. H.—,34 Atl. 674; *Shea* v. *Railroad*, 69 N.H. 361, 363, 41 Atl. 774. This does not mean that the defendants were bound to ascertain and take precaution in reference to the plaintiff's possible or chance presence in a dangerous situation upon their premises, but that they were required not to actually injure him, if circumstances existed that warranted their anticipating his presence in such a situation as a probable occurrence. *Shea* v. *Railroad, supra; Davis* v. *Railroad*, 70 N. H. 519, 49 Atl. 108."

An instance of the use of the expression "ordinary care under all the facts and circumstances of the particular case" as a sliding scale (see 11 Va. Law. Reg., Sept. No. 383) may be found in the rule formulated by our court as the degree of care required by a railroad company in regard to trespassers after they have been discovered on the track in a dangerous situation. It would seem to the lay mind, at least, that in such a case, tenderness for human life would require the *utmost* care or the *highest* degree of care, but such is the aversion of the courts to the use of these terms that they invoke the sliding scale, and push up ordinary care to a higher notch than usual. In this case it means that the railroad company must do all that can be done, consistently with its higher duty to others to save the trespasser from the consequences of his own negligent act, after his peril has been discovered. *Humphreys* v. *Valley R. Co.*, 100 Va. 749, 754, 755.

C. B. G.

MINOR FEMALE MARRYING—JURISDICTION TO APPOINT RECEIVER—SEC. 2291, VA. CODE 1904.—Sec. 2291 of the Code of 1887, provided that when a woman was a minor at the time she married and was then entitled to *any* estate, she should not, during coverture and while a minor, have the control thereof; "but the circuit court of the county, or the circuit or corporation court of the corporation, wherein she resides, or the said estate or any part thereof is,.....shall....commit her estate to a receiver," etc. This section was amended by Acts 1899-1900, ch. 1139, p. 1240, (see Va. Code 1904, sec. 2291), so as to read as to the latter part, "but the circuit court of the county, or the circuit or corporation court of the corporation wherein she resides, or the said *real* estate, or any part thereof is,.....shall.....commit her said estate to a receiver," etc.

It has been suggested to us that the insertion of the word *real* was probably a slip, and the query is made, if it be not a slip what is the effect of the insertion.

The effect of the insertion seems obvious. The former law purported to allow the property of a minor female to be committed to a receiver, when she married, by the circuit or corporation court in whose jurisdiction she resided or by any such court in whose jurisdiction the property or part of it was situated, whether the property was real or personal. As the statute now stands, if the property be personal, only the court of the county or corporation wherein she resides can commit such property into the hands